IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 103

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF

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UNITED STATES CONSTITUTION

FEDERAL STATUTES

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RESPONDENTS' BRIEF

QUESTIONS PRESENTED

1. Since petitioner was successful in both Courts below in obtaining judgments, requested by it, that Chapter 28 of the Chicago Municipal Code is applicable to respondents, may petitioner now contend in this Court that the Courts below erred in granting the judgments requested by petitioner; and may petitioner now contend that the question of applicability is open for decision.

2. Where petitioner makes no attempt to show ambiguity in Illinois law; where the Illinois law is clear and needs no construction; and where the only substantial question

is one of Federal law, does any occasion exist for remission to Illinois courts.

3. Where petitioner argues that an ordinance has a meaning different from its plain terms, whether resort can be had to legislative history for the purpose of showing that the ordinance means what it says.

4. May petitioner forbid respondent railroads to engage in interstate commerce authorized by federal statutes unless the railroads prove to petitioner's satisfaction that public convenience and necessity requires such interstate commerce.

STATEMENT OF THE CASE

The statements of the case in Nos. 103 and 104 are identical except as to the first paragraph of each entitled "the parties."

The Parties

Respondents are the 21 railroads having passenger terminals in Chicago and Railroad Transfer Service, Inc., with whom the railroads have a contract for the interstation transfer of passengers in Chicago (R. 25-43). For brevity and clarity they will hereafter sometimes be called the railroads and Transfer. Respondents sued petitioner and its officials in the United States District Court for declaratory judgment that a recently amended ordinance regulating transfer of passengers between Chicago stations is invalid under the Commerce Clause, and for injunction against its enforcement (R. 4-54). Parmelee Transportation Company was granted leave to intervene as a defendant under Rule 24(h) over the objections of respondents (R. 58-61, 65-68). Petitioner moved for summary judgment which was granted, and the Court dismissed the complaint (R. 71-72, 99-112, 155-160). The Court of Appeals held the ordinance applicable and valid except as to one section which the Court held invalid under the Commerce Clause (R. 196-213).

Interstation Transfer of Railway Passengers in Chicago

For many years the railroads have provided by tariffs for transfer of through passengers and their baggage between downtown Chicago stations. There are eight passenger terminals in downtown Chicago, each being used by from one to six railroads (R. 7). No one railroad passes through Chicago, but a very large number of railroad passengers travel through Chicago every day whose continuous

journeys begin and end at points outside of Chicago, and these transfer at Chicago from the incoming to the outgoing railroad (R. 7-8, 48-49). Approximately 3900 per day of these passengers transfer between incoming and outgoing railroads that are located in different terminal stations (R. 49). The only practical method of transferring those passengers is by motor vehicle equipped to carry such passengers and their accompanying hand baggage simultaneously (R. 7-9, 49). More than 99 per cent of the passengers so transferred between different terminal stations are traveling on through tickets between origin and destination points located in different states (R. 7, 49), and their transfer is therefore interstate commerce (R. 202).

This through transportation from origin to destination via different railroads through Chicago is provided pursuant to tariffs filed with the Interstate Commerce Commission and with the Illinois Commerce Commission (R. 7-8, 74-79, 190-195). Under applicable tariffs the through passenger transportation service includes any required passenger and baggage transfer service from the terminal station in Chicago of the incoming line to the terminal station in Chicago of the outgoing line (R. 8-9).

Pursuant to such tariffs a passenger traveling through Chicago purchases at his point of origin a railroad ticket composed of a series of coupons covering his complete transportation to his destination (R. 8, 49). If his through journey requires him to transfer from one railroad passenger terminal in Chicago to another, a part of his ticket consists of a coupon good for the transfer of himself and his baggage between such terminals (R. 8-9, 49). The tariffs provide that any such required transfer service shall be without additional charge where the fare exceeds a low minimum (R. 8, 74-79, 190-195). The expense of the transfer service is absorbed by the railroads (R. 8).

Upon arrival in Chicago the through passenger delivers the transfer coupon to the railroads' transfer agent, whereupon the transfer agent carries the passenger and his baggage from the incoming to the outgoing station without further charge (R. 26-29). The transfer agent is compensated by a specified payment to it per coupon by the outgoing terminal railroad (R. 29-31).

Regulation of the Interstation Transfer Service by the City of Chicago

The City of Chicago has regulated the interstation transfer vehicles for many years by Chapter 28 of the Chicago Municipal Code. This chapter regulates all "public passenger vehicles" and includes the transfer vehicles which it defines as "terminal vehicles." Prior to July 26, 1955, terminal vehicles were covered only by §§ 28-1 to 28-18, 28-31, and 28-32 of Chapter 28 (R. 171-189). These sections of Chapter 28 are not in issue, having been found applicable and valid by the Court of Appeals (R. 208-209, 200). They require a license for identification and regulation (R. 173, 174, 177 §§ 28-2, 28-5, 28-10, 28-11), an annual license fee (R. 175 § 28-7), observance of safety regulations (R. 173, 174, 181 §§ 28-4, 28-4.1, 28-17), and carrying insurance (R. 178 § 28-12). These provisions may be enforced by suspension or revocation of the license and by fines for violations (R. 179, 180, 189 §§ 28-14, 28-15, 28-32; R. 208-209).

On June 13, 1955, the railroads announced that effective October 1, 1955, they were discontinuing their arrangements with Parmelee Transportation Co. for performance of the transfer service and had made a contract with Railroad Transfer Service, Inc., for this purpose (R. 82, 25-43). Parmelee so informed the Chairman of the Committee on Local Transportation of the Chicago City Council, and on June 16, 1955, the Chairman introduced a proposed ordi-

nance which would give Parmelee an exclusive ten-year franchise to perform interstation transfer service (R. 85-89, 44. 93-95, 201 footnote 12 and related text). The Committee on Local Transportion considered the matter on July 21, 1955, and laid the proposed ordinance aside (R. 90-95); but on July 26, 1955, the Committee recommended an amendment of Chapter 28 to the Council for passage (R. 95) and it was passed the same day (R. 44-45).

This amendment (R. 44-45) made two material changes in Chapter 28: (1) It changed the definition of terminal vehicle so as to remove a previously existing requirement that a terminal vehicle operator must have a contract with railroads. (2) It gave Parmelee permanent terminal vehicle licenses for all of its vehicles and it provided that before the railroads and Transfer may operate any terminal vehicles they must prove that public convenience and necessity requires such operation.

Thus before the amendment "terminal vehicle" was defined as follows (R. 172, 188-189):

> "'Terminal vehicle' means a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations."

> "28-31. No person shall be qualified for a terminal vehicle license unless he has a contract with one or more railroad or steamship companies, for the transportation of their passengers from terminal stations.

> "It is unlawful to operate a terminal vehicle for the transportation of passengers for hire except for their transfer from terminal stations to destinations in the area bounded on the north by E. and W. Ohio street; on the west by N. and S. Desplaines street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan."

These provisions were changed by the July 26, 1955, amendment to read as follows (R. 44-45):

> "'Terminal vehicle' means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in Section 28-31."

> "28-31 Terminal Vehicles) Terminal vehicles shall not be used for transportation of passengers for hire except from railroad terminal stations and steamship docks to destinations in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaines Street; on the south by E. and W. Roosevelt Read; and on the east by Lake Michigan."

Thus the requirement of a contract with the railroads was removed from the definition by the amendment. The area of operation defined in both the repealed and the new sections just includes the eight downtown railroad stations.

The grant of permanent licenses to Parmelee and the requirement that the railroads and Transfer prove public convenience and necessity before operating any vehicles were accomplished by adding to Chapter 28 a new section, 28-31.1 (R. 44-45):

> "28-31.1 Public Convenience ~~and~~ Necessity) No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in Section 28-22.1, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued.

> "In determining whether public convenience and necessity require additional terminal vehicle service due

consideration shall be given to the following:

1. The public demand for such service;

2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;

3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;

4. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner."

The foregoing § 28-31.1 was held invalid by the Court of Appeals (R. 208).

Commencement of the Litigation

The railroads and Transfer advised the City that Chapter 28 as amended July 26, 1955, did not apply to their transfer operation arranged by the contract between them (R. 25-43), but that if it did apply it was invalid because of conflict with the Commerce Clause; but nevertheless, the City asserted that the ordinance as amended did apply to such transfer service, and was valid, and that the City would enforce it against the railroads and Transfer (R. 6-7 § 4). Thereafter the railroads and Transfer sued in District Court for declaratory judgment that the ordinance

is inapplicable, but that if applicable, it violates the Commerce Clause, and asked for injunction against its enforcement (R. 4-54). Parmelee was permitted to intervene as a defendant under Rule 24(b) over objection of the railroads and Transfer (R. 58-61, 65-68). The City moved for summary judgment (R. 71-72).

The District Court held Chapter 28 applicable to respondents and valid (R. 99-112, 155-159), and entered final judgment (R. 160):

> "* * * that summary judgment be entered in favor of the defendants against the plaintiffs, with costs, and that this action be and it is hereby dismissed."

The railroads and Transfer appealed from this judgment to the Court of Appeals (R. 161-162).

In the Court of Appeals the City and Parmelee strongly asserted and argued in their joint brief (1) that Chapter 28 is applicable to the interstation transfer service, and (2) that Chapter 28 is valid in all respects. (Certified copy of this brief is filed here.)

The Court of Appeals held Chapter 28 applicable to the transfer service (R. 208-209, 200) but held § 28-31.1 (R. 44-45) to be invalid because in conflict with the Interstate Commerce Act and the Commerce Clause (R. 208, 204-211).

SUMMARY OF ARGUMENT

1.

A basic error runs through petitioner's entire brief. Petitioner is trying to pretend that there remains open for decision the question whether Chapter 28 of the Chicago Municipal Code applies to respondents. In both Courts below petitioner strongly contended that Chapter 28 is applicable to respondents, and both Courts below decided that issue in petitioner's favor. Petitioner cannot now take the position that the Courts below erred in deciding this issue in accordance with petitioner's earnest contentions; and petitioner cannot now assert that this question is open for decision.

The Supreme Court of Illinois holds that the City of Chicago and other municipal corporations are bound on appeal by the positions taken in the courts below, *City of Chicago* v. *University of Chicago*, 228 Ill. 605, 607; and that holding accords with the general principle adhered to by this Court that a litigant cannot change his position in the appellate court.

2.

Although petitioner sought and obtained judgments in both Courts below that Chapter 28 is applicable to respondents, petitioner is now asserting for the first time that the issue of whether Chapter 28 is applicable to respondents should be remitted to Illinois courts for decision. Petitioner makes no attempt to show that there is any ambiguity in the ordinance that requires construction, and there is none whatsoever. The ordinance is brief and clear on this point. Moreover, petitioner does not even say what construction it would urge if the issue were remitted to the Illinois Courts.

This Court holds that there is no occasion for remission

to state courts for construction of state statutes where, as here, the statute is clear. *Toomer* v. *Witsell*, 334 U.S. 385, 392 footnote 15 (1948). Moreover, so far as we can find, in every case which this Court has remitted to state courts for construction of statutes, the state authorities from the inception of the litigation had demanded remission to state courts. There is assuredly no cause whatsoever for remission to the Illinois courts here.

3.

Petitioner argues that the Court of Appeals improperly resorted to the legislative history of the ordinance in determining that it applies to respondents. But petitioner is in error in that contention in two respects. (1) Since petitioner urged the Court to hold that Chapter 28 applies to respondents, petitioner is not in position to assert that the Court erred in deciding that issue for petitioner or in looking to the legislative history for that purpose. (2) Moreover, the Court did not resort to legislative history to decide the question of applicability at all. The Court looked to the legislative history on an entirely different issue. Petitioner argued in the Court of Appeals that the plain words of § 28-31.1 should be given a construction different from their common meaning, and the Court consulted the legislative history to see whether there was any substance to petitioner's argument. The Court held there was not.

The materials of legislative history which the Court consulted are petitioner's own official records, and petitioner has never contended that they are not correct. The Court properly consulted them. Decisions of the Supreme Court of Illinois and of this Court are clear and explicit that these records may be looked to in order to ascertain legislative intent.

4.

The interstation transfer service is a railroad operation subject to Part I of the Interstate Commerce Act and is being performed by the railroads; the identity of Transfer is merged in the railroads for purpose of regulation as railroad transportation subject to Part I. 49 U.S.C. § 302(c)(2). The service is performed pursuant to tariffs filed with the Interstate Commerce Commission, and the Commission regulates the service and can compel the railroads to perform it. Other Federal statutes authorize and compel performance of the service: 49 U.S.C. § 3(4); 45 U.S.C. § 84. The last named was enacted in 1866 to make the principle of *Gibbons* v. *Ogden*, 9 Wheaton 1 (1824), applicable to interstate railroad transportation, and the instant case affords a perfect example for the application of *Gibbons* v. *Ogden*.

Section 28-31.1, the only provision of Chapter 28 held invalid by the Court of Appeals, would give to the City the power to deny the railroads the right to operate the transfer service upon the ground that public convenience and necessity does not require interstat commerce. The Court of Appeals rightly held that that section was in conflict with Federal statutes and was invalid under the Commerce Clause.

ARGUMENT

I.

THE QUESTION OF THE APPLICABILITY OF THE ORDINANCE IS NOT BEFORE THE COURT

In both Courts below petitioner obtained judgments requested by petitioner that Chapter 28 of the Chicago Municipal Code is applicable to respondents' interstation transfer operation. Petitioner cannot now take the position that the Courts below erred in agreeing with petitioner or that the question is open for decision.

A basic error runs through petitioner's entire brief. Petitioner is trying to pretend that there remains open for decision the question whether Chapter 28 of the Chicago Municipal Code applies to respondents. But that question is not before the Court. Having urged successfully in both Courts below that Chapter 28 applies to respondents petitioner cannot now claim that this question is open or that the Courts below erred in agreeing with petitioner.

In the District Court it was conclusively established as undisputed fact that *petitioner claims* that Chapter 28 is applicable to respondents' interstate interstation transfer service, that Chapter 28 is valid in all respects, and that petitioner intends to enforce all provisions of Chapter 28 against respondents and against respondents' interstate interstation transfer service (R. 6 § 4, 71-72).

The District Court held Chapter 28 including § 28-31.1 (R. 171-189, 44-45) applicable to respondents and valid in all respects, and dismissed respondents' complaint (R. 158-160). Respondents alone appealed from this judgment to the Court of Appeals.

In the Court of Appeals petitioner strongly urged the Court to affirm the two holdings of the District Court (1)

that Chapter 28 is applicable to respondents, and (2) that Chapter 28 is valid in all respects. (Certified copy of petitioner's brief in the Court of Appeals is filed here.) The Court of Appeals held Chapter 28 applicable to respondents (R. 208-209, 200) in accord with petitioner's earnest arguments on that behalf, but held § 28-31.1 of Chapter 28 invalid because in conflict with federal authority (R. 208, 204-211).

In its brief before the Court of Appeals petitioner said on the issue of applicability, pp. 12-13:

> "That the framers of the ordinance in question intended to regulate the business carried on by Transfer wholly within the City of Chicago is hardly subject to challenge. Appellants have themselves made pointed reference to the legislative history (R. 92), and the language of the ordinance leaves no room for doubt. For among the list of motor vehicles carrying passengers for hire which are made subject to the terms of the ordinance are 'terminal vehicles.' A 'terminal vehicle' is defined in the ordinance as 'a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area' bounded on the north by Ohio Street, on the west by Desplaines Street, on the south by Roosevelt Road, and on the east by Lake Michigan. Chicago Municipal Code, c. 28, §§ 28-4, 28-31. All of the railroad terminal stations are within this area. *A more accurate description of the business engaged in by Transfer would be hard to find.*" (Emphasis added).

The definition of "terminal vehicle" quoted by petitioner in the foregoing excerpt from its brief is the definition in Chapter 28 as amended in 1955 (R. 44).

Since petitioner strongly took the position in both Courts below that Chapter 28 applies to respondents, and since both

Courts below decided this issue in petitioner's favor, petitioner cannot now take a contrary position or take the position that the question is open for decision. *City of Chicago* v. *University of Chicago*, 228 Ill. 605, 607, 81 N.E. 1138 (1907); *Drainage Comrs. Dist. No. 2* v. *Drainage Comrs. Dist. No. 3*, 211 Ill. 328, 331, 71 N.E. 1007, 1009 (1904); *Heh* v. *City of Chicago*, 328 Ill. App. 488, 491, 66 N.E. 2d 491, 492 (1946); *New York Elevated Railroad Co.* v. *Fifth National Bank*, 135 U.S. 432, 441 (1890); *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507, 513 (1953). In *City of Chicago* v. *University of Chicago*, *supra*, the Supreme Court of Illinois said:

> "It is first contended by appellants that the ordinances providing for the remission of water rates to charitable, religious or educational institutions are invalid because the city cannot give away any public property. The question does not arise on this record. The answer expressly avers that the system of waterworks is the private property of the city, conducted as a private enterprise and not as a governmental function, and that the city has full right and authority to charge and collect from its patrons whatever rates it may see fit to fix, so long as they are reasonable, and to designate institutions to which it will furnish water free. Having alleged the validity of the ordinance in its pleading and proceeded to a hearing on that theory, the city cannot now be heard to say that the circuit court erred in adopting its view."

It is not necessary to change the word "validity" in the last sentence above to "applicability" in order to say that that case fits the instant case perfectly.

2.

NO OCCASION EXISTS FOR REMISSION OF ISSUES TO ILLINOIS COURTS

Petitioner makes no attempt to point to any ambiguity in Chapter 28 and none exists. The ordinance is clear and petitioner fails to point to any error in its construction by the Courts below. No occasion exists for remission of issues to the Illinois Courts.

After having obtained judgments which it requested in the Courts below holding that Chapter 28 is applicable to respondents' interstation transfer service, petitioner is now making the contention for the first time, p. 17, that the cause should be remitted to Illinois Courts for the construction of the ordinance on the question of applicability. There is no merit in this claim.

Petitioner does not even attempt to show any ambiguity that calls for construction. Petitioner fails to state what construction it would urge if the cause were remitted to the Illinois Courts. Petitioner fails to show any basis whatsoever for its request.

The principle governing this case is set forth very clearly in *Toomer* v. *Witsell*, 334 U.S. 385 (1948), which affirmed *Toomer* v. *Witsell*, D.C.S.C., 73 F. Supp. 371 (1947). The District Court there said, p. 374:

> "The statutes involved are clear and there is no such need for interpretation or other special circumstances as would warrant the Court in staying action pending proceedings in courts of the state, as was held proper in *American Federation of Labor* v. *Watson*, 327 U.S. 582, 595, 599."

On that point this Court said, 334 U.S. p. 392 footnote 15:

> "Appellees stress *American Federation of Labor, Metal Trades Dept.* v. *Watson*, 327 U.S. 592, (1946).

> We think the doctrine of that case applicable to one of the arguments made against § 3374, *supra* note 40. See the third division of this opinion; *infra*, p. 394. As to all the other statutes, except that relating to state income taxes, however, we agree with the District Court that there is neither need for interpretation of the statutes nor any other special circumstance requiring the federal court to stay action pending proceedings in the State courts."

Similar holdings are *Moreif* v. *Doud*, 354 U.S. 457, 469-470 (1957), and *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U.S. 341, 344 (1951).

Thus remission to state courts is a matter for the Court's discretion, and only where the Federal Court is itself unable to construe the statute. Here petitioner does not attempt to point to ambiguity that requires clarification, since there is none. Petitioner only claims remission as a matter of right, and no such right exists.

The provision of Chapter 28 which petitioner would have the Court remit to the Illinois Courts for construction is § 28-1 as amended in 1955 (R. 44):

> "'Terminal vehicle' means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in Section 28-31."

The "area defined in Section 28-31" (R. 44) is just enough to include all of the downtown Chicago railroad stations.

Section 28-1 is the same section as to which petitioner said in its brief in the Court of Appeals, p. 13:

> "A more accurate description of the business engaged in by Transfer would be hard to find."

The Court of Appeals agreed with Petitioner (R. 208-

209, 200) that Chapter 28 is applicable to the transfer service. Now petitioner is reneging on the solemn assurance it gave to the Court of Appeals.

Petitioner relies upon *Government & C.E.O.C., C.I.O.* v. *Windsor*, 353 U.S. 364 (1957), but there are at least two differences which make that case inapplicable here. In that case the state officials made the objection at the outset that the cause should be remitted to the state courts for construction of the statute. 116 F. Supp. 354, 357. And the various opinions in the case show a genuine and substantial question of construction, which is not present here.

We have examined all of the opinions of this Court remitting decision to state courts, and in every one the demand for remission was made at the outset of the litigation. Where, as here, the statute is simple, the petitioner has obtained in the two Courts below the construction it there demanded, and the plea for remission is first made in this Court, no case exists for remission.

The Decision of the Federal Courts That Chapter 28 Is Applicable Would Be Res Judicata in the Illinois Courts.

If the Court were to remit the cause to the Illinois Courts for consideration of the issue of applicability of Chapter 28, there could be no decision there since the judgments of the two Federal Courts would be *res judicata* on the question there. *State Life Insurance Co.* v. *Board of Education*, 394 Ill. 301, 317, 324, 68 N.E. 2d 525, 533, 536 (1946); *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938). In the first case the Supreme Court of Illinois held that a construction of an Illinois statute by a Federal court was *res judicata* when an attempt was made to relitigate the question of construction in a case between the same parties in an Illinois court. It

held that this was true even though, as it appeared there, the Federal court had adopted a construction not in accordance with Illinois law. In *Stoll* v. *Gottlieb*, *supra*, the Court reversed an Illinois decision for failing to hold that the judgment of a Federal court was *res judicata* in an Illinois court.

3.

RESORT TO LEGISLATIVE HISTORY WAS PROPER

Section 28-31.1 is invalid on its face, and the Court of Appeals so held without resort to legislative history. But petitioner argued that the words of § 28-31.1 should be given a meaning different from that accorded them by the Supreme Court of Illinois and by this Court. To consider that argument the Court looked to the report of the City Council Committee recommending § 28-31.1 for passage. It should be noted that the Court did not resort to legislative history to determine whether the ordinance is applicable to respondents, and petitioner is in error in so alleging.

Petitioner argues, pp. 8-9, that the Court of Appeals improperly resorted to the legislative history of the ordinance in determining that the ordinance applies to respondents' interstation transfer service. There are two immediate answers to that. (1) The Court did not look to the legislative history for that purpose at all, but for another purpose which was induced by one of petitioner's arguments on another subject. (2) As shown in our part 1 above, petitioner steadfastly contended in both courts below that the ordinance applies to respondents; hence petitioner cannot now complain that the Court considered the legislative history in reaching agreement with petitioner on the issue of applicability.

The Court looked to the legislative history in connection with an issue entirely different from the question of ap-

plicability petitioner is now trying to assert, and this resort to legislative history was occasioned by an argument in petitioner's brief in the Court of Appeals. The Court held § 28-31.1 invalid on its face without resort to legislative history; that is entirely clear (R. 205-208). But then in response to an argument by petitioner that the plain words of that section have a meaning entirely different from their commonly accepted meaning, the Court considered the legislative history and concluded that there was nothing in it that supported petitioner's argument (R. 208).

Thus in its brief before the Court of Appeals petitioner said in part, p. 36:

> "The constitutional issue as to whether the ordinance imposes an undue burden on interstate commerce is not nearly so intricate and confused as would appear from appellants' briefs. The issue may be clarified and simplified if two basic propositions are borne in mind:
>
> "1. We concede that the city may not withhold a license to carry on interstate transfer operations solely or even primarily on the ground that existing facilities are adequate, or that additional operations will adversely affect the competitive situation, or other such 'economic' grounds. *Buck* v. *Kuykendall*, 267 U.S. 307 (1925)."

And petitioner further said, pp. 52-53:

> "1. The term 'public convenience and necessity' aptly refers to considerations within the police power.
>
> "The term 'public convenience and necessity' may well have acquired some economic connotations because of the manner in which the concept is normally employed, i.e., by agencies having full power to consider the economic desirability of issuing a license or certificate as well as factors bearing on public health, safety, and welfare. It is by no means, however, con-

> fined to economic considerations, but is sufficiently broad to encompass considerations of public health, safety, and welfare; and it is an appropriate term to be used where the agency in question has power to consider only such police factors as distinguished from economic considerations."
>
> * * * * * *
>
> "The Supreme Court has never doubted that a 'certificate of public convenience and necessity' may lawfully be withheld on police-power grounds."

While it is obvious that the grounds of selective denial of the right to engage in the transfer service would be irrelevant, as the Court of Appeals pointed out, citing *Castle* v. *Hayes Freight Lines*, 348 U.S. 61 (R. 209), the Court, nevertheless, also answered the argument on construction by referring to legislative history. After summarizing petitioner's "police power" arguments (R. 206-208), the Court rightly concluded (R. 208) that § 28-31.1 consisted only of economic regulation, but said (R. 208): "If there were any doubt that this conclusion is correct, the legislative history of the ordinance dispels that doubt." Then the Court summarized briefly the more extended statement of the legislative history in the Court's statement of the facts (R. 197-202).

It is clear that the Court's conclusion that § 28-31.1 is invalid was not induced in any respect by its consideration of the legislative history, but that the Court's reference to that history was made for the purpose of ascertaining whether it supported petitioner's argument on construction. The Court found no support for that argument.

It is also clear that the materials of legislative history consulted by the Court (R. 93-95) were proper for that purpose. The two cases cited by petitioner, pp. 10-11, in support of its argument are not in point. Illinois decisions agree

with the decisions of this Court on resort to legislative history. Petitioner's two cases did not involve the materials of legislative history that are commonly accepted; there were no committee minutes or reports in petitioner's cases, only pro and con conversations and correspondence.

In the instant case there are the official minutes of the Committee on local transportation of July 21, 1955 (R. 93-94), and the official minutes and report of the Committee to the Council of July 26, 1955 (R. 95-96, 44), followed by the specific action of the Council enacting the ordinance described in and transmitted to the Council with the report (R. 44-45). This was proper material for consideration of legislative history. *United States* v. *International Union, U. A. W.*, 352 U.S. 567, 570 (1957); *Western Sand & Gravel Corpn.* v. *Town of Cornwall*, 2 Ill. 2d 560, 564, 119 N.E. 2d 261, 264 (1954).

The principle of resort to legislative history is too well understood to require argument. *United States* v. *International Union, supra.* It is established in the law of Illinois. In *City of Rockford* v. *Schultz*, 296 Ill. 254, 257, 129 N.E. 865, 866 (1921) the Court said, in words closely applicable to the instant case:

> "The object in construing a statute is to ascertain and give effect to the legislative intent, and to that end the whole act, the law existing prior to its passage, any changes in the law made by the act, and the *apparent motive for making such changes*, will be weighed and considered." (Emphasis added.)

There the Supreme Court of Illinois resorted to the report of a special committee of the legislature to ascertain "the apparent motive" in amending a statute.

In *Dean Milk Co.* v. *Chicago*, 385 Ill. 565, 570, 53 N.E. 2d 612, 615 (1944), the Court said:

> "The rules for the construction of an ordinance are the same as those applied in the construction of a statute."

The Court there considered a large amount of extrinsic legislative history and testimony of expert witnesses to determine the meaning of the ordinance, citing the foregoing as justification for such procedure.

In *People* v. *Olympic Hotel Bldg. Corp.*, 405 Ill. 440, 445, 91 N.E. 2d 597, 600 (1950), the Court said:

> "Resort to explanatory legislative history has been declared not to be forbidden no matter how clear the words may first appear on superficial examination. (*Harrison* v. *Northern Trust Co.*, 317 U.S. 476.)"

In the case cited in the foregoing excerpt this Court made the statement attributed to it in consulting the report of a committee.

In *Boshuizen* v. *Thompson & Taylor Co.*, 360 Ill. 160, 163, 195 N.E. 625, 626 (1935), the Court said:

> "For the purpose of passing upon the construction, validity or constitutionality of a statute the court may resort to public official documents, public records, both State and national, and may take judicial notice of and consider the history of the legislation and the surrounding facts and circumstances in connection therewith."

It is entirely clear that the Court of Appeals reached the conclusion that § 28-31.1 is invalid on its face under the Commerce Clause without taking the legislative history into consideration (R. 205-208). The Court did not resort to legislative history as a basis for concluding that § 28-31.1 is invalid, but only to answer an argument of Parmelee and the City to the effect that the section should be given a meaning differing from its plain terms. Thus the legislative

history at the most hardly rises to the dignity of cumulative evidence on this issue, and clearly had no effect upon the Court's conclusions in reaching its decision that the section is invalid.

The Legislative History Is Too Patent in the Framework of This Case to Be Overlooked

Independently of the foregoing however, the legislative history of § 28-31.1 of Chapter 28 is just too patent and too pervading in the framework of this case to be overlooked. The progression of events reveals an impressively purposeful, and temporarily successful, course of action that cannot be ignored.

The most superficial glimpse of these events is fully revealing. For some years Chapter 28 of the Chicago Municipal Code had regulated *inter alia* "terminal vehicles" (R. 171-189). These were defined (R. 172) as a "public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations." Parmelee had the only contract. On June 13, 1955, the railroads announced that they were discontinuing their relations with Parmelee and had arranged with Transfer to perform the service beginning October 1, 1955 (R. 82). On July 26, 1955, the Council passed the 1955 amendment to Chapter 28 (R. 44-45).

Now § 28-31.1 gave to the City Council the right to determine by ordinance whether anyone other than Parmelee may engage in interstate commerce by terminal vehicle. And the sole criterion for Council action is the economic concept of "public convenience and necessity."

These public events, occurring between June 13 and July 26, 1955, could mean only that the City and Parmelee

were trying to perpetuate Parmelee as the transfer agent of the railroads and to prevent Transfer from performing the service. And the City and Parmelee never made any secret of the fact that such was their purpose. They stoutly defended § 28-31.1 in the District Court and filed a joint brief in the Court of Appeals, insisting that § 28-31.1 was applicable to respondents' transfer service and was valid and that they intended to enforce § 28-31.1 against the railroads and Transfer. They are making the same contentions here.

These public events clearly reveal the City's and Parmelee's purpose without resort to the proceedings of the Council Committee on Local Transportation. But any interested person looking at the Council proceedings (R. 44) could not fail to notice reference to the Committee's report. From there it is most natural to go to the official records of the Committee's proceedings (R. 93-96). Assuredly one is not compelled to be so blind or naive as not to notice these interesting official records which so clearly corroborate the plain meaning of the public events leading to the enactment of § 28-31.1.

Petitioner's Argument That "Public Convenience and Necessity" Embraces Ordinary Police Power Factors and Not Transportation Economics Considerations Is Erroneous

Petitioner's arguments in the Court of Appeals, above described, that the term "public convenience and necessity" embraces only valid police power factors and not considerations of transportation economics, and hints along the same line in its brief here, pp. 17-18, are wholly lacking in foundation and are erroneous.

The Supreme Court of Illinois and this Court have un-

formly held that the phrase "public convenience and necessity" includes only the economic regulation of transportation and not any elements of the police power. In *Egyptian Transportation System* v. *Louisville and Nashville R. Co.*, 321 Ill. 580, 587-588, 152 N.E. 510, 512-513 (1926), the Court said:

> "To authorize an order of the Commerce Commission granting a certificate of convenience and necessity to one carrier though another is in the field it is necessary that it appear first that the existing utility is not rendering adequate service. (*West Suburban Transportation Co.* v. *Chicago and West Towns Railway Co.*, 309 Ill. 87.) The method of regulation of public utilities now in force in Illinois is based on the theory of a regulated monopoly rather than competition, and before one utility is permitted to take the business of another already in the field it is but a matter of fairness and justice that it be shown that the new utility is in a position to render better service to the public than the one already in the field. (*Chicago Motor Bus Co.* v. *Chicago Stage Co.*, 287 Ill. 320.) It is in accord with justice and sound business economy that the utility already in the field be given an opportunity to furnish the required service."

In *The Commerce Commission* v. *Chicago Railways Company*, 362 Ill. 559, 566, 1. N.E. 2d 65, 68-69 (1936), the Court said:

> "Before the enactment of the Public Utilities Act such highways and streets were open to competition by any company which sought to carry passengers, provided it had the proper highway consent. The purpose of the Utilities act was to control this competition so that such service would not be destroyed because of ruinous competition but would be protected under proper regulation."

In *Schiller Piano Co.* v. *Illinois Northern Utilities Co.*,

288 Ill. 580, 585-586, 123 N.E. 631, 633 (1919), the Court said:

> "The Public Utilities act of this State has no relation to the public health, safety or morals, but was enacted to protect the public against unreasonable charges and discrimination and to promote the general welfare."

In many other cases the Illinois Court has held without exception that the phrase "public convenience and necessity" in the Illinois Public Utilities Act, Ill. Rev. Stat., 1955, Bar Assn. Ed., Ch. 111⅔, § 56, set out in part in appendix hereto, relates only to economic regulation of competition, monopoly, rates, services, and other economic factors, and does not embrace any elements of police power regulation.[1]

Section 28-31.1 was copied bodily from § 28-22.1 of Chapter 28 which regulates taxicabs (R. 183-184). This section was construed by the Supreme Court of Illinois in 1947 to be a measure for the economic regulation of the taxicab business, a means of limiting the number of cabs for the purpose of limiting competition, and was held valid. *Yellow Cab Co.* v. *City of Chicago*, 396 Ill. 388, 71 N.E. 2d 652. While Illinois has that power in respect to intrastate commerce by taxicab it has no such power in respect to interstate commerce.

In *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60 (1945), the Court was called upon for construction and application of the phrase "public convenience and necessity"

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[1] *Eagle Bus Lines, Inc.* v. *Illinois Commerce Commission*, 3 Ill. 2d 66, 119 N.E. 2d 915 (1954); *Chicago & West Towns Railways, Inc.* v. *Illinois Commerce Commission*, 383 Ill. 20, 43 N.E. 2d 320 (1943); *Bartonville Bus Line* v. *Eagle Motor Coach Line*, 326 Ill. 200, 157 N.E. 175 (1927); *Illinois Power & Light Corp.* v. *Commerce Commission*, 320 Ill. 427, 151 N.E. 326 (1926).

in the Interstate Commerce Act. The Court said *inter alia*, p. 69:

> "Public convenience and necessity should be interpreted so as to secure for the Nation the broad aims of the Interstate Commerce Act of 1940." (citing cases).

The Act of 1940 created 49 U.S.C. § 302(c), 54 Stat. 920. Obviously the "broad aims" of that act cannot be realized if the City of Chicago is to be permitted to set its own standards of public convenience and necessity for interstate commerce which is performed pursuant to § 302(c).

However, the short and immediately dispositive answer is that the interstate transportation here involved could not be barred for any reason, particularly where the transportation is not considered objectionable and denials would be made only on a selective basis. *Castle* v. *Hayes Freight Lines*, 348 U.S. 61 (1954); *Gibbons* v. *Ogden*, 9 Wheaton 1 (1824); *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U.S. 1 (1878).

4.

SECTION 28-31.1 IS INVALID UNDER THE COMMERCE CLAUSE

The interstation transfer service is being performed by the railroads as railroad transportation subject to Part I of the Interstate Commerce Act by force of 49 U.S.C. § 302(c)(2). It is performed pursuant to tariffs filed with the Interstate Commerce Commission and is regulated by the Commission. The Federal acts under which the service is performed conflict with § 28-31.1 of Chapter 28 and render it invalid.

Petitioner states in the heading of Part II of its brief, p. 12: "The city has power to license and regulate the use of city streets for the transportation of passengers for

hire, even though interstate commerce is affected thereby, without placing an unreasonable burden thereon." The Court of Appeals held all of Chapter 28 valid and applicable (R. 208-209, 200) except § 28-31.1, which it held invalid under the Commerce Clause and the Interstate Commerce Act (R. 208, 204-211). In support of the judgment of the Court of Appeals, and to meet petitioner's sweeping argument as captioned above, we repeat here the argument in our brief in No. 104, pp. 17-23, 25-35.

THE NATURE OF THE 1955 AMENDMENT

The text of the 1955 amendment to Chapter 28 (R. 44-45) and the circumstances of its origin have been set out above, pp. 5-8. It will be noted that new § 28-31.1 accomplishes two things. (1) It provides for the annual renewal or transfer to replacement vehicles of all of the existing Parmelee terminal vehicle licenses without proof of public convenience and necessity. (2) It compels any other applicant for a terminal vehicle license to prove to the satisfaction of the city vehicle license commissioner that "public convenience and necessity" requires issuance of the license, and it provides that upon a favorable report by the commissioner "the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the Commissioner."

In sum and substance new § 28-31.1 gave to the City Council the right to determine by ordinance whether anyone other than Parmelee may engage in interstate commerce by terminal vehicle. The sole criterion for Council action is the economic concept of "public convenience and necessity."

There are no possible facets of validity in § 28-31.1. (1) This is not a case where regulatory legislation is aimed at a type of traffic deemed undesirable. Parmelee is per-

mitted to continue with all its vehicles. (2) Section 28-31.1 did not add any safety measures whatsoever to those already existing and applicable in Chapter 28 (R. 171-189). It cannot be justified as a "police power" measure. (3) The provision of numbered subparagraph 2 of § 28-31.1 was not actually intended to reduce traffic congestion. This is so because all of Parmelee's vehicles are left in operation and the ordinance as amended can only add more vehicles.

No decision of the Court ever has sustained a measure of this character. Instead, there are numerous cases holding such an enactment violative of the Commerce Clause. We will proceed to consider the nature of the transfer service, and we will show that under federal statutes and decisions § 28-31.1 is invalid in its application to the service.

The Transfer Service Is Railroad Transportation Subject to Part I of the Interstate Commerce Act

The interstation transfer service is railroad transportation subject to Part I of the Interstate Commerce Act and is being performed *by the railroads* by force of § 202(c)(2) of Part II of the Act, 49 U.S.C. § 302(c)(2), and other federal statutes. Section 302(c) is the following:

> § 302(c) Notwithstanding any provision of this section or of section 303, the provisions of this part [Part II], except the provisions of section 304 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—
>
> (1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall

be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental. (Act of Sept. 18, 1940, 54 Stat. 920; Act of May 16, 1942, 56 Stat. 300.)

If the railroads were performing the transfer service by their own directly owned and operated motor vehicles it would be hard to imagine that anyone would argue that the service was not railroad service under ¶ (1) of § 302(c). Yet the status of the service performed under the contract between the railroads and Transfer (R. 25-43) is, by force of ¶ (2) of § 302(c), precisely the same as if the railroads were performing it directly under ¶ (1). Thus it will be noted that § 302(c)(2) provides that

"* * * transportation by motor vehicle by any person *(whether as agent or under a contractual arrangement) for a common carrier* by railroad subject to Part I * * * in the performance within terminal areas of transfer, collection, or delivery service * * * shall be considered to be performed by such *carrier* * * * as part of, and shall be regulated in the same manner as, the trans-

portation by railroad * * * to which such services are incidental." (Emphasis added.)

While this language is entirely clear, it may be noted that Congress meant exactly what it said. See Conference Report, House Report No. 2832, 76th Cong., 3rd Sess., p. 74 § 17(B) (Serial vol. 10444):

> "These definitions, as rewritten, also dealt with the case where a person (acting as agent or under a contractual arrangement) performed transfer, collection, or delivery services by motor vehicle within terminal areas for carriers by railroad, express companies, other motor carriers, or water carriers, and provided that in such a case the transportation should be regulated as transportation performed by the person for whom the services were rendered in the same manner as the railroad, express, motor carrier, or water transportation to which the services were incidental."

The effect of § 302(c)(2) is to merge the identity of Transfer into the railroads. Transfer is simply the *alter ego* of the railroads; and the transfer operation is simply and wholly railroad transportation. *Thomson* v. *United States*, 321 U.S. 19, 24 (1944); *United States* v. *Rosenblum Truck Lines*, 315 U.S. 50, 56 (1942). These cases hold that for purpose of regulation generally under the Interstate Commerce Act the agent, though performing all of the physical service, is integrated into the principal to the extent of losing his own identity. Here the statute so provides in express terms and makes the operation subject to Part I.

Decisions of the Interstate Commerce Commission illustrate the application of § 302(c). Before the section was effective, in *Pick-Up of Livestock in Illinois, Iowa and Wisconsin*, 238 I.C.C. 671 (1940), the Commission cancelled railroad tariffs providing for pick-up of livestock by motor

truck within a 10-mile radius of railroad stations on the grounds that the railroads had no motor carrier authority under Part II of the act and that the transportation was not subject to Part I, saying, 238 I.C.C. p. 678:

> "It is our conclusion, therefore, that the motor-vehicle operations under consideration are not subject to the provisions of part I, and hence are subject to the provisions of part II. It necessarily follows that they are being conducted without lawful authority, since no certificate that public convenience and necessity require such operations has been sought or obtained."

After § 302(c) was enacted, Sept. 18, 1940, 54 Stat. 920, the Commission reopened the case and held that by force of the statute the proposed pick-up operations by the railroads were now lawful, *Pick-Up of Livestock in Illinois, Iowa and Wisconsin*, 248 I.C.C. 385 (1942), saying, p. 397:

> "We find that respondents' schedules and that respondents' pick-up operations and practices thereunder to the extent hereinafter indicated are 'within terminal areas' within the meaning of section 202(c) of part II, and that such truck operations must be regulated as transportation subject to part I of the act. We further find that a lawful terminal area for each station should not exceed a radius of 10 miles, and that the tariffs should clearly and definitely define the areas within which pick-up service is performed."

In *Cartage, Rail to Steamship Lines at New York*, 269 I.C.C. 199, 200 (1947), the Commission held that § 302(c) empowered it to compel railroads to perform interstation transfer service by motor vehicle. In *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 97-103 (1954), the question was whether railroad owned highway trailers moved on railroad flat-cars in so-called "piggyback" service, and having prior and subsequent movements on their own wheels on city streets, were subject to Part I or Part II;

that is, whether the railroads needed authority under Part II in order to perform the operation or any part of it. The Commission held the entire operation subject to Part I, the movement on city streets being subject to Part I by force of § 302(c). Railroad tariffs defining the entire street-rail-street "piggyback" operation as subject only to Part I were held valid in *Trailers on Flatcars, Eastern Territory*, 296 I.C.C. 219 (1955), by reason of § 302(c). This section applies to passenger transfer. *New York, S. & W. R. Co. Application*, 46 M.C.C. 713, 722-725 (1946).

Section 3(4) of Title 49 provides:

> "(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and *for the receiving, forwarding, and delivering of passengers or property to and from connecting lines*; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III." (Emphasis added.)

"There is no warrant for limiting the meaning of 'connecting lines' to those having a direct physical connection * * * The term is commonly used as referring to all the lines making up a through route." *Atlantic Coast Line R. Co. v. United States*, 284 U.S. 288, 293 (1932). The lines operating the Chicago transfer service all make up through routes through Chicago (R. 7-8, 48-50, 74-79, 190-195), and thus the transfer service in Chicago is performed by connecting lines within the meaning of § 3(4).

By force of 49 U.S.C. § 3(4), *supra*, the railroads "are

required to * * * afford motor truck transfer in connection with transportation by rail." *Central Transfer Company* v. *Terminal Railroad Assn.*, 288 U.S. 469, 473 footnote 1 (1933).

The transfer service is performed pursuant to railroad tariffs filed with the Interstate Commerce Commission (R. 7-8, 74-79, 190-195). While tariffs remain on file they are presumed valid. *Robinson* v. *Baltimore & Ohio Railroad Co.*, 222 U.S. 506, 508-510 (1912). The tariffs have the force and effect of a statute in compelling performance of the service. *Pennsylvania Railroad Co.* v. *International Coal Mining Co.*, 230 U.S. 184, 197 (1913).

Federal Statutes Have Superseded the Power of the City to Enforce § 28-31.1

Being railroad transportation subject to Part I the transfer service is subject to regulation thereunder and to other Federal Statutes respecting railroad transportation. By force of these statutes the power of the City to impose the regulation here in issue has been superseded and is void under the Commerce Clause.

The Interstate Commerce Act

The Interstate Commerce Act was amended in 1906 to include express companies within its coverage for the first time. 34 Stat. 584, 49 U.S.C. § 1(3)(a). This inclusion was held to supersede the power of the City of New York to enforce an ordinance requiring licenses for express company trucks that delivered packages following an interstate railroad haul. *Barrett (Adams Express Co.)* v. *New York*, 232 U.S. 14 (1914). The Court said, p. 32:

> "* * * Congress has exercised its authority and has provided its own scheme of regulation in order to secure the discharge of the public obligations that the

business involves. Act of June 29, 1906, c. 3591, 34 Stat. 584."

Answering the argument that the ordinance was valid under the police power the Court said, p. 31:

> "Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege, and prohibit its exercise in the absence of a local license."

To the same effect are *New York Central & Hudson River Railroad Co.* v. *Hudson County*, 227 U.S. 248, 263 (1913), and *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61, 65 (1954). It is clear that 49 U.S.C. § 302(e)(2) supersedes the City's attempted regulation under § 28-31.1 of Chapter 28 (R. 44-45) as fully as the supersession considered in the three cases above cited. We will take up the *Hayes* case more fully later.

THE RAILROAD COMMUNICATION AND INTERCHANGE ACT OF 1866

A statute of significance to this case is 45 U.S.C. § 84. It was enacted in 1866 to put an end to an obstruction to interstate commerce by railroad remarkably similar to that here involved, and to outlaw all future obstructions of whatever nature to interstate commerce by railroad. Legislative history is explicit on these points, and the Court has given the statute the meaning and force called for by its history.

The exact form of enactment of the statute is of interest because of its history, 14 Stat. 66:

> "CHAP. CXXIV.—*An Act to facilitate commercial, postal, and military communication among the several States.*
>
> "Whereas the Constitution of United States confers upon Congress, in express terms, the power to regulate

commerce among the several States, to establish post roads, and to raise and support armies: Therefore:—

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That every railroad company in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination: *Provided*, That this act shall not affect any stipulation between the government of the United States and any railroad company for transportation or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road, nor shall it be construed to authorize any railroad company to build any new road or connection with any other road without authority from the State in which said railroad or connection may be proposed.

"SEC. 2. *And be it further enacted*, That Congress may at any time alter, amend, or repeal this act.

"APPROVED, June 15, 1866."

Both the specific immediate purpose and the general purpose of this Act were stated in some detail in the House Committee Report recommending its passage, House Report No. 31, 38th Cong., 1st Sess., March 9, 1864 (Serial vol. 1206), printed in full in Appendix hereto p. 47. The bill proposed by the Report was passed by the House in the 38th Congress but was not voted upon by the Senate. This same bill was re-introduced as H.R. 11 in the 39th Congress, 1st Session, and was enacted.

The debates in both the 38th and 39th Congresses all revolve about the facts and issues recited in House Report No. 31. The linkage of 45 U.S.C. § 84 to House Report 31, 1st Sess., 38th Congress, is complete.[2]

The Report shows, *inter alia*: The New Jersey legislature chartered the Camden and Amboy Railroad Company and provided by an act of 1854:

> "'That it shall not be lawful, at any time during the said railroad charter, (to wit, the Camden and Amboy,) to construct any other railroads in this State without the consent of the said companies, which shall be intended or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the railroad authorized by the act to which this supplement is relative.' (New Jersey Session Laws for 1854, p. 387.)"

Under that act the Camden and Amboy obtained an injunction in New Jersey courts forbidding a rival, the Delaware and Raritan Bay Railroad Company, "to carry or aid in carrying passengers and freight between New York and Philadelphia." The tracks of the Delaware and Raritan were in New Jersey but "by means of these roads and boats on Raritan Bay and the Delaware River, a continuous through line is constituted between the cities of New York and Philadelphia."

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[2] The text of the bill in the 38th Congress, H.R. 307, is not contained in Report No. 31 which accompanied it, but is shown in the debates on passage in the House, 34 Cong. Globe 2253-2264; and the bill as passed appears at page 2264. In the 39th Congress the reintroduced bill was reported "do pass" as H.R. 11 by the Committee on Commerce, 36 Cong. Globe 82, and its proponents stated that it was the same bill as H.R. 307 which had failed to pass in the 38th Congress, 36 Cong. Globe 82-83. It was debated and passed in the House, 36 Cong. Globe 1548-1550, and in the Senate, 36 Cong. Globe 2870-2876.

The House Committee's conclusions were in part the following:

"In addition to the well-established power of Congress to establish post roads, the committee believe that its power to regulate commerce confers upon it ample authority to grant the petitioners' prayer, and to relieve them from the embarrassments created by the narrow and obnoxious legislation of New Jersey.

"Article 1, section 8, of the Constitution of the United States provides that Congress 'shall have power to regulate commerce with foreign nations, *and among the several States*, and with the Indian tribes.'

"This power has been held to be exclusive in Congress, and that it cannot be abridged or impaired by State legislation.—(*Gibbons* v. *Ogden*, 9 Wheaton.)"

* * * * *

"It clearly appears, from the various opinions given in these celebrated cases, that the power to regulate commerce is absolutely exclusive in Congress, so that no State can constitutionally enact laws or any regulation of commerce between the States, whether Congress has exercised the same power in question or left it free.

"The inference from the various cases cited is that New Jersey, by the law above quoted; and by virtue of which she is attempting to destroy the franchises of the petitioners, has usurped the jurisdiction of Congress, and that we are authorized to interfere to prevent that usurpation from abridging one of the means of communication between New York and Philadelphia."

The Act of June 15, 1866, 14 Stat. 66, 45 U.S.C. § 84, was the means adopted to accomplish the recommended action.

There is remarkable similarity between the New Jersey Act of 1854 and the Chicago ordinance of 1955, in respect both to ends and means. In each case a state legislative

body assumed the power to decide whom it would permit to engage in interstate commerce. The Court's decisions construing 45 U.S.C. § 84 are especially apposite to the instant case.

In *Bowman* v. *Chicago & North Western Railway Co.*, 125 U.S. 465 (1888), an Iowa statute was held invalid that forbade transportation of intoxicating liquor into the state except where a permit had been issued by the state.[3] The Court, p. 484, *recited most of* § 84, referred to an act authorizing construction of railroad bridges, and said:

> "'These Acts were passed under the power vested in Congress to regulate commerce among the several States, and were designed to remove trammels upon transportation between different States which had previously existed, and to prevent a creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi; and they were intended to reach trammels interposed by state enactments or by existing laws of Congress. * * * The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation.'"

Union Pacific Railway Co. v. *Chicago, Rock Island & Pacific Railway Co.*, 163 U.S. 564 (1896), involved an attempt by Union Pacific to cancel a contract with Rock Island providing for connections and through transportation between the two as *ultra vires* the U.P. Charter. The

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[3] This decision prevailed until in 1913 the Webb-Kenyon Act, 37 Stat. 699, removed the protection of the Commerce Clause from intoxicating liquor. See *Clark Distilling Co.* v. *Western Maryland Railroad Co.*, 242 U.S. 311 (1917). See a brief comparison of the *Bowman* and *Clark Distilling* cases in *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 424 fn. 29 (1946).

Court denied the relief sought. After reciting most of 45 U.S.C. § 84 the Court said, p. 589:

> "It is impossible for us to ignore the great public policy in favor of continuous lines thus declared by Congress, and that such it is in effectuation of that policy that such business arrangements as will make such connections effective are made."

It may be noted that the *proviso* of 45 U.S.C. § 84 is in no way applicable here. What the railroads are here seeking to accomplish is not a new operation; they are simply continuing an interstation transfer service that they have been performing for many years, for the past seventeen years under 49 U.S.C. § 302(c)(2). It is the City that is trying to bring about a new situation, by the enactment of § 28-31.1.

The Telegraph Act of 1866

The same Congress that enacted the railroad communication act of 1866, now 45 U.S.C. § 84, also passed the telegraph act, July 24, 1866, 14 Stat. 221, now 47 U.S.C. §§ 1-5, Appendix p. 57. The two statutes have had parallel constructions and both have been cited in the same decisions on the issues of the instant case. Probably the most famous case to emerge from judicial construction of either act is *Pensacola Telegraph Company* v. *Western Union Telegraph Company*, 96 U.S. 1 (1878). A Florida statute, similar in effect to the Chicago ordinance, forbade any telegraph company to operate lines in interstate commerce except by the state's permission. The Court held that the federal act rendered the state act invalid under the Commerce Clause. This holding is indistinguishable from the issue of the instant case.

On the same day, March 19, 1888, that the Court decided *Bowman* v. *Chicago & North Western Railway Co.*, 125 U.S.

465, *supra*, it also decided *Western Union Telegraph Co.* v. *Atty. Gen. of Massachusetts*, 125 U.S. 530. There it was held that a Massachusetts statute was invalid by force of the telegraph act of 1866, in that it authorized an injunction forbidding operation of the telegraph lines until the company paid its taxes. The Court said, p. 554:

> "If the Congress of the United States had authority to say that the Company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done."

In *Kansas City Southern Railway Co.* v. *Kaw Valley Drainage District*, 233 U.S. 75 (1914), both the railroad and telegraph acts of 1866 were cited. The Court held invalid the judgment of a Kansas court ordering the railroad to remove certain bridges, saying pp. 78-79:

> "The freedom from interference on the part of the states is not confined to a simple prohibition of laws impairing it, but extends to interference by any ultimate organ. It was held that under the permissive statute authorizing telegraph companies to maintain lines on the post roads of the United States a state could not stop the operation of the lines by an injunction for failure to pay taxes. *Western U. Teleg. Co.* v. *Atty. Gen.*, 125 U.S. 530; *Williams* v. *Talladega*, 226 U.S. 404, 415, 416. It would seem that the same principle applies to railroads under the commerce clause of the Constitution, especially if taken in connection with the somewhat similar statute now Rev. Stat. § 5258, U.S. Comp. Stat. 1901, p. 3565 [45 U.S.C. § 84]
> * * *
>
> "The decisions also show that a state cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the states could not be justified in this way. * * *".

The instant case affords a perfect example for the application of *Gibbons* v. *Ogden*, 9 Wheaton 1 (1824). There the New York legislature did not object to steamboats on the Hudson; instead it welcomed them, but only if they were operated under the license granted by the legislature to Fulton and Livingston and their successors. The Court held that the New York act was superseded by the federal coasting license act, 1 Stat. 305, 46 U.S.C. §§ 251 *et seq.*

Here the Chicago City Council does not object to the operation of the interstation transfer vehicles; instead it welcomes them, but only if they are operated under the licenses granted by the Council to Parmelee. Anyone else who wants to operate transfer vehicles in interstate commerce must go to the Council, via the license commissioner, and obtain the passage of an ordinance granting such authority (R. 44-45). Plainly, the ordinance is superseded by the Interstate Commerce Act and the railroad interchange act of 1866. It would be impossible for the railroads to assume their duties under those acts and at the same time yield to § 28-31.1 of the Chicago ordinance.

Moreover, one purpose of the railroad communication act of 1866 was to make the principle of *Gibbons* v. *Ogden* applicable to railroads. See pp. 37-39 above.

In *Harmon* v. *Chicago*, 147 U.S. 396 (1893), the Court held a Chicago ordinance invalid under the rule of *Gibbons* v. *Ogden*, *supra*, 9 Wheaton 1. The ordinance "exacted a license * * * for the privilege of navigating the Chicago river and its branches by tug boats." The tugs had federal coasting licenses. Citing *Gibbons* v. *Ogden*, the Court said, pp. 406-407:

> "* * * The requirement that every steam tug, barge, or towboat, towing vessels or craft for hire in the Chi-

cago river or its branches shall have a license from the City of Chicago, is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions imposed by the city. This ordinance is, therefore, plainly and palpably in conflict with the exclusive power of Congress to regulate commerce, interstate and foreign. * * *"

Castle v. Hayes Freight Lines

Castle v. *Hayes Freight Lines*, 348 U.S. 61 (1954), has roots running directly to the railroad and telegraph acts of 1866 and to the decisions construing them. The *Hayes* case held invalid an Illinois statute authorizing state officials to forbid a motor carrier to operate on the state's highways for a fixed period as a penalty for habitual violation of state laws regulating the maximum weight of trucks. The Court said, pp. 63-64, that since Congress had vested the Interstate Commerce Commission with power to suspend or revoke motor carrier certificates

"* * * it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate. Cf. *Hill* v. *Florida*, 325 U.S. 538."

Hill v. *Florida*, 325 U.S. 538 (1945), cited in the foregoing excerpt, held invalid a Florida statute which forbade anyone to act as representative of a labor organization unless licensed as such by the state. The Court held that this requirement was invalid because in conflict with the provision of the National Labor Relations Act giving employees freedom to choose their own representative, saying p. 543:

"It is the sanction here imposed * * * which brings about a situation inconsistent with the federally protected process of collective bargaining. *Cf. Western Union Telegraph Co.* v. *Atty. Gen.*, 125 U.S. 530, 553.

554; *Kansas City Southern R. Co.* v. *Kaw Valley Drainage Dist.*, 233 U.S. 75, 78; *St. Louis Southwestern R. Co.* v. *Arkansas*, 235 U.S. 350, 368."

The federal statutes that authorize and compel the railroads to perform the interstation transfer service have supersedure power at least equal in force to the federal acts given effect in *Gibbons* v. *Ogden*, 9 Wheaton 1; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U.S. 1; and *Castle* v. *Hayes Freight Lines*, 348 U.S. 61. Any interruption of the transfer service would collide with the duty of the railroads to perform it under their tariffs, and with the power of the Interstate Commerce Commission to compel it.

Who Shall Conduct Interstate Commerce

It is to be noted that the exercise of state power which the Court has forbidden in these leading cases is the power to say *who* shall engage in federally authorized interstate commerce. In these cases the states did not object to or attempt to stop steamboat traffic, telegraph lines, truck lines, or union business agents; they only wanted to say *who* should conduct these activities. But the Court held that the exercise of state power to decide *who* should conduct the operation was just as much of an obstruction to the commerce as an outright stoppage of it would be. Exactly the same principle is applicable here.

CONCLUSION

Petitioner's argument is confusing to us in some respects. But one thing is altogether clear. Petitioner wants to have this cause removed to a local Chicago court. There is no merit whatsoever in this plea, as we have pointed out in Parts 1 and 2 of our argument. But in addition to what we said there, we submit that this case involves the funda-

mental issue which called the Commerce Clause into being, the protection of interstate commerce against local political obstruction.

The only real issue here involves construction of the Commerce Clause and Federal statutes regulating interstate commerce. That issue is one for which the Federal courts were created and for which they are especially suited. See, for example, 28 U.S.C. § 1337. Petitioner points to no real issue of Illinois law now, and was entirely satisfied to have Federal cognizance of *all* issues in the two Courts below.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

38TH CONGRESS, 1st Session. | HOUSE OF REPRESENTATIVES | REPORT No. 31.

DELAWARE AND RARITAN BAY RAILROAD COMPANY.

[To accompany bill H. R. No. 307.]

MARCH 9, 1864.—Ordered to be printed.

MR. DEMING, from the Committee on Military Affairs, made the following

REPORT.

The Committee on Military Affairs, to whom was referred the petition of the Raritan and Delaware Bay Railroad Company, respectfully report:

The petitioners pray that their roads and the boats connected with them may be declared post and military roads of the United States.

The committee find that the petitioners have completed a road of sixty-five miles in length, from Port Monmouth, near Sandy Hook, to Atsion, nearly east of the city of Philadelphia; and that they also have the control of the Camden and Atlantic Railroad Company; and that the two roads are connected by the Botsto branch of the Camden and Atlantic Railroad Company; and that by means of these roads and boats on Raritan bay and the Delaware river, a continuous through line is constituted between the cities of New York and Philadelphia.

The committee find that since the petition was brought before this committee the chancellor of New Jersey, at the suit of the Camden and Amboy Railroad Company, has enjoined the use of the petitioners' roads, except for local purposes, and has ordered that the Raritan and Delaware Bay Railroad Company pay to the Camden and Amboy Railroad Company all sums collected by the former for through business, including the amount received for transportation of troops; and that the chancellor decreed that the petitioners' road had no right to carry or aid in carrying passengers and freight between New York and Philadelphia.

The committee find that the act of the State of New Jersey, by authority of which the petitioners have been enjoined from carrying on their roads passengers and freights between New York and Philadelphia, is as follows: "That it shall not be lawful, at any time during the said railroad charter, (to wit, the Camden and Amboy,) to construct any other railroads in this State without the consent of the said companies, which shall be intended or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the railroad authorized by the act to which this supplement is relative."—(New Jersey Session Laws for 1854, p. 387.)

The committee find that from the 1st of September, 1862, to the 1st of June, 1863, there were transported from New York to Philadelphia, over the petitioners' road, 17,428 men, 649 horses, and 806,245 pounds of freight, under the orders of the government.

The committee find that Congress has five times exercised the power of establishing post roads. The first case in which it was exercised is to be found in volume 10 United States

Statutes at Large, page 112, where, in sections 6 and 8 of an act making appropriations for the Post Office Department, it is enacted that the bridges across the Ohio river at Wheeling, in the State of Virginia, and at Bridgeport, in the State of Ohio, abutting on Jane's island, in said river, are hereby declared to be lawful structures in their present position and elevation, and shall so be held and taken to be, anything in any law or laws of the United States to the contrary notwithstanding; and that said bridges are declared to be, and are, established *post roads for the passage of the mails* of the United States.

The second instance in which Congress exercised the power is to be found in "An act to establish certain post routes, and to discontinue others, (5 U. S. Statutes at Large, p. 271,) where, in section 2, it is provided that each and every railroad within the limits of the United States which now is, or hereafter may be, made and completed, shall be a post route, and the Postmaster General shall cause the mail to be transported thereon.

The third instance is in "An act to establish certain post roads," approved March 3, 1853, (U. S. Statutes at Large,) where the same legislation is reaffirmed; and it is again enacted in section 3 of said act, "that all railroads which now, or hereafter may be, in operation, be, and the same are hereby, declared to be post roads."

The fourth instance in which Congress exercised the right is found in volume 12, U. S. Statutes at Large, pp. 569, 570, where, in "An act to establish certain post roads," in sections 1 and 2, it is enacted "that the bridge partly constructed across the Ohio river, at Steubenville, in the State of Ohio, abutting on the Virginia shore of said river, is hereby declared to be *a lawful structure*."

"That the said bridge and Holliday's Cove railroad are hereby declared a public highway and established a *post road*, for the purpose of transmission of mails of the United States, and that the Steubenville and Indiana Railroad Company, chartered by the legislature of the State of Ohio, and the Holliday's Cove Railroad Company, chartered by the State of Virginia, or either of them, are authorized *to complete, maintain, and operate said road and bridge* when completed, as set forth in the preceding section, anything in the law or laws of the above-named States to the contrary notwithstanding."

The fifth congressional precedent is to be found in volume 12, U. S. Statutes at Large, p. 334. In "An act to authorize the President of the United States in certain cases to take possession of railroad and telegraph lines, and for other purposes," approved January 31, 1863, it is enacted that "the President of the United States, when in his judgment the public safety may require it, be, and he is hereby, authorized to take possession of any or all the railroad lines of the United States, so that they shall be considered *post roads, and part of the military establishment* of the United States."

Your committee find that the Supreme Court has affirmed the constitutionality of the act of Congress in reference to the Wheeling bridge. In 12th Howard, 528, the Supreme Court, after the passage of the act in question, denied a motion to punish the owners of the bridge for a contempt in rebuilding it, and affirm in the following words, "that the act declaring the Wheeling bridge a lawful structure was within the legitimate exercise by Congress of its constitutional power to regulate commerce."

In addition to the well-established power of Congress to establish post roads, the committee believe that its power

to regulate commerce confers upon it ample authority to grant the petitioners' prayer, and to relieve them from the embarrassments created by the narrow and obnoxious legislation of New Jersey.

Article 1, section 8, of the Constitution of the United States provides that Congress "shall have power to regulate commerce with foreign nations, *and among the several States*, and with the Indian tribes."

This power has been held to be exclusive in Congress, and that it cannot be abridged or impaired by State legislation.—(Gibbons *vs.* Ogden, 9 Wheaton.)

When the State of New York undertook to restrict navigation by local law, in granting to Livingston & Fulton an exclusive right to navigate the waters of New York with vessels propelled by steam, the Supreme Court of the United States, through Chief Justice Marshall, declared the restriction to be illegal, because it interfered with commerce between the States, and, in his opinion, he raised the intention of the Constitution above the narrow interpretation of the word *"commerce,"* which would confine it to the transportation of property, and declared it embraced all inter-State communications, and the whole subject of intercourse between the people of the several States; thus ascribing to Congress the power to regulate the transit both of persons and property through and across contiguous or intervening States. In this case Chief Justice Marshall says:

"But in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass these lines. The commerce of the United States with foreign nations is that of the whole United

States. Every district has a right to participate in it. Th
deep streams which penetrate our country in every dire
tion pass through the interior of almost every State in th
Union, and furnish the means for exercising this right.
Congress has the power to regulate it, that power must b
exercised wherever the subject exists. If it exists within th
States, if a foreign voyage may commence or terminate at
port within a State, then the power of Congress may b
exercised within a State."

In the case of the State of Pennsylvania *vs.* The Wheelin
and Belmont Bridge Company, 18 Howard, 421, the Stat
of Pennsylvania claimed the right to limit and control th
means of transit across the Ohio river to the State of Ohi
upon grounds of State interest, which were sustained by th
Supreme Court so long as Congress refrained from legis
lation upon the same subject. By the law of Pennsylvani
these bridges were condemned as nuisances, and the Su
preme Court affirmed the condemnation. But the publi
demand for the increased commercial facilities afforded b
these condemned structures claimed and received the atten
tion of Congress, and, under its unquestioned power t
regulate commerce and to establish post roads, it enacte
in respect to each of these bridges that they were an
should continue to be lawful structures, anything in any
State law to the contrary notwithstanding. The Supreme
Court sustained the action of Congress, as legalizing by it
paramount authority the structures with the State sover
eignty condemned, and they are now established as perma
nent post routes.

The argument by which the power of Congress to inter
pose in this and similar cases, when the general interests
of commerce are embarrassed and impaired by local State
legislation, is set forth with great clearness and force in

the opinion of the Supreme Court, delivered by Justice Nelson, in the case just cited. It concedes the right of State sovereignty within its own limits, and by its own legislative acts or compacts, to restrict or to encourage the enterprise of its own citizens, in the use of its own territory. But all such legislation is subject and subordinate to the constitutional power of Congress to regulate commerce among the States, and whenever that is exercised the local State laws and compacts must give way. If this were not so, the constitutional grant of the power would be a vain thing.

In the passenger cases, 18 Howard, 283, the Supreme Court holds that the statutes of New York and Massachusetts, imposing taxes upon alien passengers arriving at the ports of those States, was in derogation of the article of the Constitution which gives power to Congress to regulate commerce with foreign nations and among the States, and therefore unconstitutional and void.

In expressing the opinion of the Court, Judge McLean says, page 400: "Shall passengers, admitted by act of Congress without a tax, be taxed by a State? The supposition of such a power in a State is utterly inconsistent with a commercial power, either paramount or exclusive, in Congress."

Judge Grier says, page 462: "To what purpose commit to Congress the power of regulating our intercourse with foreign nations and among the States, if these regulations may be changed at the discretion of each State? And to what weight is that argument entitled which assumes that because it is the policy of Congress to leave this intercourse free, therefore it has not been regulated, and each State may put as many restrictions upon it as she pleases?"

It clearly appears, from the various opinions given in these celebrated cases, that the power to regulate commerce is absolutely exclusive in Congress, so that no State can

constitutionally enact laws or any regulation of commerce between the States, whether Congress has exercised the same power in question or left it free.

The inference from the various cases cited is that New Jersey, by the law above quoted, and by virtue of which she is attempting to destroy the franchises of the petitioners, has usurped the jurisdiction of Congress, and that we are authorized to interfere to prevent that usurpation from abridging one of the means of communication between New York and Philadelphia.

The committee find, therefore, that Congress has, in these cases, exercised the power which the petitioners ask may be interposed in their behalf, and that, both under the clause of the Constitution which authorizes it to establish post offices and post roads, and under the clause which authorizes it to regulate commerce, it has the clear right to grant petitioners the relief for which they pray. The committee find, moreover, that the State of New Jersey has, by her own legislative action, impliedly admitted the right of Congress to establish a railroad between New York and Philadelphia. By the sixth section of an act relating to the Camden and Amboy Railroad and Transportation Company, it is declared "that when any other railroad or roads for the transportation of passengers and property between New York and Philadelphia, across this State, shall be constructed and used for that purpose, under or by virtue of any law of this State or *the United States authorizing or recognizing said road*, that then, and in that case, the said dividends shall no longer be payable to the State, and the said stock shall be retransferred to the company by the treasurer of this State."

The committee come now to consider the question whether the present application presents a proper case for the exer-

cise of the powers which it has already been shown Congress possesses. In answering this question it should be borne in mind that the exercise of this power is invoked, not only by the petitioners, but also by the government, and by the travelling and trading community, who now earnestly seek new channels of communication between New York and Washington. It appears by a letter addressed by General Meigs to the special committee investigating the propriety of establishing a new railroad between here and New York, that the government requires not only all the available means, but additional facilities, for the transportation of troops and munitions of war over the line which is partly covered by the roads of the petitioners, and that it has more than once been constrained to relieve the existing lines by water conveyance of troops to the capital. It also appears that during the recent freezing of the Potomac, the insufficiency of our means of transportation for military purposes was painfully apparent, and I have already stated that on one memorable occasion, when great promptness and great exertions were required, the petitioners greatly aided the government in the conveyance of troops and warlike material to the seat of war, and their reward has been an injunction from through transportation, and an order to account to the Camden and Amboy company for the money which they received for this service. No matter how urgent the emergency; no matter how imperative the demand of the army for re-enforcements; the roads of the petitioners are now closed, not only against the government, but against the citizens of every State; and troops, munitions of war, and travellers, are only permitted to pass from New York to Philadelphia over the roads of the monopoly. The quartermaster's department of the city of New York a few days ago applied to the petitioners to transport a regiment to Philadelphia, and the application was denied, because

such transportation had been enjoined by the chancellor of New Jersey.

In this connexion it is worthy of remark that since the injunction the rates of traffic upon the Camden and Amboy railroad have been unexpectedly and suddenly advanced.

The fact that additional accommodations for trade and travel between New York and Philadelphia is demanded as well by the government as for public convenience, is supported by the action of Congress and of the legislatures of the States.

On the 12th of the present month a resolution was passed by the House of Representatives which declares in its preamble "that the facilities for convenient and expeditious travel and transportation of troops between the cities of New York and Washington, especially between New York and Philadelphia, are at present notoriously inconvenient and inadequate."

Congress has also been officially informed that the legislatures of the States of Maine and New York have requested their representatives and instructed their senators to urge upon us the necessity for increasing the facilities for convenient and expeditious travel between the cities of New York and Philadelphia, and which, in the language of the resolutions, are stated to be "at present notoriously inconvenient and inadequate."

It has never been claimed that any State has the right to inhibit the transit across its territory of passengers and merchandise. The committee are unable to appreciate any distinction between a total inhibition of transit and the permission to use only a specified route, whose limited means virtually amount at least to a partial, if not a total, prohibition. Both the government and the public require con-

stant and prompt means of communication, and anything which prevents this is a prohibition which ought not to be tolerated.

Under the facts already stated, the question presented by the applicants resolves itself into this: Is it expedient for Congress to authorize a road which was legally constructed under proper State authority, and which has a legal right to transport passengers and merchandise from the Delaware river to Raritan bay, to commence such transportation from the city of Philadelphia, on the opposite side of the Delaware, and continue it to the city of New York, on the opposite shore of the Raritan? The necessities of the government, the necessities of the public, and the absolute rights of commercial intercourse, all require that this question should be answered in the affirmative.

The Committee on Military Affairs therefore unanimously recommend the passage of the accompanying bill.

Telegraph Act of 1866

47 U.S.C. § 1. Use of public domain. Any telegraph company organized under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

§ 2. Use of materials from public lands. Any telegraph company organized under the laws of any State shall have the right to take and use from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of its lines of telegraph, and may preempt and use such portion of the unoccupied public lands subject to preemption through which their lines of telegraph may be located as may be necessary for their stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

§ 3. Government priority in transmission of messages. Telegrams between the several departments of the Government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster General shall annually fix. And no part of any appropriation for the several departments of the Government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section.

§ 4. Purchase of lines. The United States may, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all companies acting under the provisions of sections 1 to 6 of this title, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected.

§ 5. Acceptance of obligation to be filed. Before any telegraph company shall exercise any of the powers or

privileges conferred by law such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by law.
(Act of July 24, 1866, 14 Stat. 221).

ILLINOIS REVISED STATUTES, 1955, BAR ASSN. ED.,
CHAPTER 111⅔

56. Certificate of convenience and necessity.]

§ 55. No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction.

No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State and not possessing a certificate of public convenience and necessity from the State Public Utilities Commission or the Public Utilities Commission, at the time this Act goes into effect shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity.